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Treaties within the History of International Law

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1 Introduction

The earliest traces of the use of treaties in international relations date back to the very beginnings of recorded history. The oldest 'international' agreement on record stems from Sumerian Mesopotamia from about the twenty-fourth century BC. It concerns the settlement of a border dispute between the cities of Lagash and Umma. Several other treaties have been recovered in Mesopotamia and Syria from the third millennium, as from all the great civilisations of the Ancient Near East.[1] Ever since, treaties have been a constant occurrence of international relations in all parts of the world.

Scholars have generally traced the history of current international law back to the emergence of the modern sovereign State, which they situate in late-medieval Europe. Many historians of international law from the nineteenth and early twentieth centuries have taken this State- and Eurocentric approach to its ultimate consequence by claiming that no international law existed during Antiquity or most of the Middle Ages. Over the last decades, a more relativist understanding of 'international law' has gained the upper hand, leading to the recognition of different types of international law throughout history.[2] Whereas few if any scholars would conceive of the history of international law from pre-

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[1] A. Altman, *Tracing the Earliest Recorded Concepts of International Law: The Ancient Near East (2500–330 BCE)* (Leiden: Martinus Nijhoff, 2012), pp. 20–22, 34–38, 67–75, 111–142 and 190–199.

[2] The German Roman lawyer Wolfgang Preiser has been instrumental in this: W. Preiser, 'Zum Völkerrecht der vorklassische Antike', *Archiv des Völkerrechts*, 4 (1954), 257–288, and 'Die Epochen der antiken Völkerrechtsgeschichte', *Juristenzeitung*, 11 (1956), 737–744. For an early example of the relativist approach: P. Vinogradoff, *Historical Types of International Law: Lectures Delivered in the University of Leiden* (Leiden: E.J. Brill, 1923). Also in W. E. Butler (ed.), *On the History of International Law and*

classical or classical Antiquity as the history of a single evolving system, there is a general recognition that there is continuity for some institutions or principles of international law.[3] Treaties are among those. In case of treaties, it has been established that a tradition runs from the Ancient Near East over the Greeks and the Romans to the Byzantine Empire and the Germanic vanquishers of the Western Roman Empire.[4] Through this and the mediating role of Roman and canon law in the Late Middle Ages, this tradition feeds into the international legal order as it started to develop in late-medieval and Renaissance Europe.[5]

This chapter highlights some aspects of the role of treaties as instruments of international law from Antiquity to the present. The discussion is limited to the line that flows from classical Antiquity over the European Middle Ages and the Early Modern Age to the treaty law of the nineteenth and twentieth centuries, which then found its codification in the Vienna Conventions of 1969[6] and 1986.[7] This is not to deny that the European encounter with the wider world during the Age of Colonisation had an impact on the development of modern treaty law. But within the limits of this chapter, focus is laid on the main line of tradition. Revision of Eurocentric historiography of international law is valuable and much needed, but one should be careful not to overstate the case of the impact of non-European cultures through the colonial encounter on the formation of the European classical law of nations, that is prior to nineteenth century.[8] Certainly, the European imperialists of the sixteen to eighteenth centuries in their dealings with particularly

International Organization. Collected Papers of Sir Paul Vinogradoff (Clark, NJ: Lawbook Exchange, 2009), pp. 69–143.

[3] For a discussion of this shift in historiography and a survey of literature: C. Focarelli, 'The Early Doctrine of International Law as a Bridge from Antiquity to Modernity and Diplomatic Inviolability in 16th- and 17th-Century Practice' in R. Lesaffer (ed.), *The Twelve Years Truce (1609): Peace, Truce, War and Law in the Low Countries at the Turn of the 17th Century* (Leiden: Koninklijke Brill NV, 2014), pp. 210–232.

[4] P. Karavites, *Promise-Giving and Treaty-Making: Homer and the Near East* (Leiden: E.J. Brill, 1992) and E. S. Gruen, *The Hellenistic World and Coming of Rome* (Berkeley, CA: University of California Press, 1984).

[5] R. Lesaffer, 'Roman Law and the Intellectual History of International Law' in A. Orford and F. Hoffmann (eds.), *The Oxford Handbook of the Theory of International Law* (Oxford: Oxford University Press, 2016), pp. 38–58.

[6] 1155 UNTS 331. [7] ILM, 25 (1986), 543–592.

[8] The foremost representative of the revisionist historians of the 'Third World Approaches of International Law' is A. Anghie: see his *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2005). See, further, M. Koskenniemi, 'Histories of International Law: Dealing with Eurocentrism', *Rechtsgeschichte*, 19 (2001), 152–176.

Asian but also African rulers were often not in a position to one-sidedly impose their legal institutions. Moreover, research under the lens of the colonial encounter may very well indicate instances of how non-European elements fed into the European law of nations, but this does not reach the point where one could with justice deny that the historical roots of modern treaty law are predominantly Mediterranean and European.[9] The backbones of the customary law of treaties which was codified in the Vienna Conventions – such as the doctrine of good faith, the many analogies from contract law, its State-centeredness, its various forms – were already present in the classical law of nations of Early Modern Europe. Its major roots lay in late-medieval and early-modern European practices as well as in doctrines taken from Roman (private) law and canon law.[10]

This chapter falls into two sections. In the first section, the evolving function of treaties in international law is discussed in general terms. The focus is on the question to what extent treaties, apart from creating specific obligations between the treaty parties, were also constitutive sources of international law and order.[11] This relates to but goes beyond the modern distinction between *traités-contrats* and *traités-lois*.[12] It also includes the function of treaties as 'social contracts' which constitute or reform the legal and political order to which they belong. In other words,

[9] On treaty relations between Europe and Asian and African polities in the Early Modern Age, see C. H. Alexandrowicz, 'Treaty and Diplomatic Relations between European and South Asian Powers in the Seventeenth and Eighteenth Centuries', *Hague Recueil*, 100 (1960–II), 203–321; see, also, C. H. Alexandrowicz, *An Introduction to the Law of Nations in the East Indies (16th, 17th and 18th Centuries)* (Oxford: Clarendon Press, 1967); C. H. Alexandrowicz, 'The Afro-Asian World and the Law of Nations (Historical Approach)', *Hague Recueil*, 123 (1968–I), 117–214, and C. H. Alexandrowicz, *The European-African Confrontation: A Study in Treaty Making* (Leiden: A.W. Sijthoff, 1973).

[10] R. Lesaffer, 'The Medieval Canon Law of Contract and Early Modern Treaty Law', *J. History Int'l L.*, 2 (2000), 178–198.

[11] A brief word on terminology as used throughout the chapter is necessary. Treaties are called 'informative sources' of international law to indicate the case in which they apply and thus render evidence of existing international law. They are called 'constitutive sources' of international law if they contribute to the creation of new international law. This encompasses several modes in which treaties contribute to the law-making process. The term 'formal source' is restricted to one of these modes, namely the case of treaties which directly introduce new generally binding rules between the parties on the basis of their agreement. 'Constitutional' refers to the formation or reformation of international organisations or polities through the use of treaties.

[12] On the origins of the distinction, see H. Lauterpacht, *Private Law Sources and Analogies of International Law (with Special Reference to International Arbitration)* (London: Longman, Green & Co., 1927), pp. 156–159.

a third category of *traités-constitutions* needs to be added. The first section also discusses the basis for the binding character of treaties as well as their form. The second section gives a survey of the main functions of treaties from the perspective of their content. An attempt is made to offer a functional classification of treaties throughout (Western) history.[13] The conclusion offers a brief reflection on the different historic functions of treaties as sources of international law.[14]

2 Treaties and the Formation of International Law

2.1 Antiquity (2500 BC–500 AD)

The question of the constitutional role of treaties for international order and law in classical Antiquity can be best approached from the debate about the function of *amicitia* (friendship). *Amicitia* is a qualification of peace. It goes beyond the mere absence of a state of war or armed conflict as it entails a general obligation to favour and not to harm one another. The obligation extends to the subjects and sometimes allies of the *amici* but is not necessarily concretised in any way.[15] The German historian Theodor Mommsen (1817–1903) cast a long shadow over this debate. Mommsen applied the Hobbesian doctrine of natural enmity to Roman international relations and law. According to Mommsen, the natural state of relations between the Romans and foreign peoples was one of permanent war. This state could only be terminated through a treaty of friendship.[16] Later historians, chiefly among them Alfred Heuß (1909–1995), have refuted Mommsen's theory on two major points.[17] According to Heuß and the vast majority of scholars after him, the natural or initial state of relations between foreign peoples was one not

[13] Attempts at classifications of treaties are to be found in A. D. McNair, 'The Functions and Differing Legal Character of Treaties', *BYbIL*, 11 (1930), 100–118, and A. Rapisardi-Mirabelli, 'La classification des traités internationaux. Aperçus de systématique', *Revue de droit international et de législation comparée*, 4 (1923), 653–667.

[14] See, further, the discussion in the contribution to this volume of Brölmann at pp. ___-___.

[15] R. Lesaffer, 'Amicitia in Renaissance Peace and Alliances Treaties', *J. History Int'l L.*, 4 (2002), 77–99, and B. Paradisi, 'L'amitié dans les phases critiques de son ancienne histoire', *Hague Recueil*, 78 (1951–I), 325–378.

[16] T. Mommsen, *Römisches Staatsrecht* (Vol. III.1) (Leipzig: Hirzel, 1887), pp. 590–592.

[17] L. C. Winkel defends the doctrine of natural enmity: 'Einige Bemerkungen über ius naturale und ius gentium' in M. J. Schermaier and Z. Végh (eds.), *Ars boni et aequi. Festschrift für Wolfgang Waldstein zum 65. Geburtstag* (Stuttgart: Steiner, 1993), pp. 443–449.

of enmity but of indifference. Moreover, whereas *amicitia* was indeed, as Mommsen suggested, the foundational and necessary precondition to the development of peaceful international order and law between polities – at least outside the bonds of ethnical and religion kinship – according to Heuß, there were no autonomous, constitutive treaties of *amicitia* and the relationship was established through less formal ways such as the exchange of emissaries and gifts.[18] Later research has sustained the theory of Heuß in general terms, but some scholars have discovered treaties of *amicitia* leading them to claim that treaties were not a necessary condition for *amicitia* but a possible form of it.[19] In any case, *amicitia* through treaty was exceptional. The vast majority of initial treaties between polities and peoples established a relation between polities which included but also went beyond *amicitia*, such as commerce, alliance, subjection or federation. Also, they stipulated more concrete obligations between the partners. So it can be said that already in Antiquity – as these findings are also confirmed for Greek international practice and by records on the Ancient Near East – treaties were first and foremost used to create specific obligations between peoples and polities.

From this, however, it cannot be concluded that treaties were not constitutive sources of international law. In many cases, treaty parties had relatively little pre-existing common international law to draw on and to apply in treaties. There are several instances of multi-party international systems – in the Ancient Near East between 1450 and 1200 BC, the Greek-Persian world (600–338 BC), the Roman-Hellenistic world (500–168 BC) and the Roman Empire (168 BC–500 AD)[20] – wherein relations were sufficiently intense and sustained for a common body of norms and institutions of international relations to develop. Treaties formed a constitutive source of this international law. Although the vast majority of treaties were bilateral, they were instrumental in the articulation of general rules and forms as in these systems, standard forms of treaty-making as well as standard material stipulations emerged.

[18] A. Heuß, 'Die völkerrechtliche Grundlagen der römischen Außenpolitik in republikanischer Zeit', *Klio, Beihefte*, 13 (1933), 1–59.

[19] F. de Martino, *Storia della costituzione romana* (Vol. II) (Naples: Jovene, 1973), pp. 26–29, and K.-H. Ziegler, 'Das Freundschaftsvertrag im Völkerrecht der römischen Antike' in *Pensamiento juridico y sociedad internacional. Estudios en honor Antonio Truyol y Serra* (Vol. II) (Madrid: Centro de estudios constitutionales–Universidad Complutense, 1986), pp. 1263–1271.

[20] Preiser, 'Die Epochen der antiken Völkerrechtsgeschichte', *supra* n. 2, and K.-H. Ziegler, *Völkerrecht. Ein Studienbuch* (Munich: Beck, 2nd ed., 2007), pp. 11–51.

Treaties were the most important sources for later treaties and were thus constitutive for the customary practice and even customary law of treaty-making, in relation both to form as to content.[21]

The emergence of organised international order found its reflection in the Greek stoic idea of common humanity and natural law. In Roman doctrine, natural law came to be associated to the *jus gentium*. Originally the body of law the Roman *praetor peregrinus* applied to cases involving foreigners, in the works of the orator Marcus Tullius Cicero (106–43 BC) and different lawyers from the imperial period, the *jus gentium* appeared as the common law of mankind and as an articulation of natural law. By the end of the Roman period, the term *jus gentium* was used both to refer to universal private law as well as to (public) international law.[22]

The commonality and continuity of ancient treaty practice are most obvious in relation to the forms of treaty-making. From the earliest treaties of the Ancient Near East to the treaty practice of the later Roman Empire, the standard form of treaty-making combined oral commitment with the swearing of an oath under the invocation of the gods or God. In remoter times, the oath-taking had often been accompanied by self-cursing and religious rituals such as sacrifices. Already in the Ancient Near East, treaties were also written down and published on tablets or pillars, and sometimes copies were preserved in temples. It was, however, the oral commitment and the oath, and not the recording, which were constitutive of the obligation. The records served as proof of the treaty and its content, for men as well as for the gods whose retribution for future violation was invoked under the oath.[23]

[21] C. Baldus, *Regelhafte Vertragsauslegung nach Parteirollen* (Frankfurt: Peter Lang, 1998); D. J. Bederman, *International Law in Antiquity* (Cambridge: Cambridge University Press, 2001), pp. 137–206; Gruen, *supra* n. 4, at pp. 13–53, and C. Phillipson, *The International Law and Custom of Ancient Greece and Rome* (Vol. II) (London: Macmillan, 1911), pp. 1–89.

[22] H. C. Baldry, *The Unity of Mankind in Greek Thought* (Cambridge: Cambridge University Press, 1965); M. C. Horowitz, 'The Stoic Synthesis of the Idea of Natural Law in Man', *J. History of Ideas*, 35 (1974), 3–16; T. Honoré, *Ulpian. Pioneer of Human Rights* (Oxford: Oxford University Press, 2nd ed., 2002), pp. 76–93; M. Kaser, *Ius gentium* (Köln/Weimar/Vienna: Böhlau, 1993); Lesaffer, *supra* n. 5; L. Winkel, 'The Peace Treaties of Westphalia as an Instance of the Reception of Roman Law' in R. Lesaffer (ed.), *Peace Treaties and International Law in European History: From the End of the Middle Ages to World War One* (Cambridge: Cambridge University Press, 2004), pp. 222–238, at pp. 225–229.

[23] A. Watson, *International Law in Archaic Rome: War and Religion* (Baltimore: Johns Hopkins University Press, 1993), pp. 1–19 and 31–37, and K.-H. Ziegler, 'Conclusion and Publication of International Treaties in Antiquity', *Israel L. Rev.*, 29 (1995), 233–249.

The binding character of treaties was vested in the commitment of their faith by the treaty parties to the sanction of their respective gods. In the past, this has induced scholars to refute the very existence of international legal obligation, but over recent decades, scholars have come to accept religious obligation as just another form of normativity and as the ancients' form of international legal obligation.[24] In archaic Greece and Rome, the binding character of treaties was not so much based on mutual agreement as on the separate commitments by both parties. Of course, an agreement to do so underlay this form and over time, the idea of agreement started to surface. As one scholar recently elucidated, religious obligation came to be supplemented by a normativity founded, first, on social sanction coming from the fear of gods and, second, on intellectual sanction, coming from the fear of moral indignation and political isolation. While originally based on religion, the foundations for this were gradually secularised into a customary rule of the obligatory character of international agreements. As in domestic law, this found its doctrinal expression in the Greek and Roman concept of good faith (*πιστις, bona fides*).[25]

2.2 The Middle Ages (500–1500)

Many of the concepts, forms and institutions of ancient treaty law and practice survived into the Early Middle Ages, both in the Byzantine Empire as in the defunct Western Roman Empire. The Germanic peoples who conquered the West and founded new kingdoms there had at some point established treaty relations with the Roman emperors as their *foederati* (allies). During the Early Middle Ages, among the Germanic kingdoms, *amicitia* was an important institution of international relations and regained its meaning as the foundation to more elaborate legal relations. It was associated to the institution of 'sworn friendship', a personal relation with mutual obligations between equals. More than in Antiquity, treaties were used to establish friendship – and stipulate more specific obligations – just as personal sworn friendship was established through pacts.[26]

[24] For a survey of the discussion, see Bederman, *supra* n. 21, at pp. 1–15, and Focarelli, *supra* n. 3.

[25] Bederman, *supra* n. 21, at pp. 48–53.

[26] On the Early Middle Ages: G. Althoff, '*Amicitiae* as Relationships between States and Peoples' in L. K. Little and B. H. Rowenstein (eds.), *Debating the Middle Ages: Issues and Readings* (Malden: Blackwell, 1998), pp. 191–210; B. Paradisi, *Storia del diritto*

After the revival of the Latin West in the so-called Renaissance of the Twelfth Century, a new international legal order emerged. On the one hand, this order was marked by the extreme fragmentation of public authority over a great variety of polities ranging from the Empire and the Church over great kingdoms, secular and ecclesiastical principalities, feudal fiefs, city-states to the smallest seigniories. These all stood in some kind of hierarchical relationship to one another but could also hold far-reaching autonomy. On the other hand, the Latin West was an integrated political order. This was based on the unity of faith and of the Church under the supreme authority of the Bishop of Rome and on the idea of the continuity of the Roman Empire (*renovatio/translatio imperii*). One has to think of the *respublica christiana* – as it was to be named during the Renaissance – as a hierarchical continuum of a myriad of polities which ultimately all fell under the supreme authority of the pope in spiritual matters, which was real, and of the emperor in temporal matters, which was at best theoretical but came to be rejected altogether under the doctrine of the division of empire.[27] Its unity found legal expression in the universal application of canon law and the commonality of the learned study of canon and Roman law.[28]

Within the confines of the legal space that was the *respublica christiana*, the divide between the 'inter-national' and 'intra-national' sphere faded. Moreover, the personal character of political relations of dependency which came with feudality as well as the Germanic patrimonial conception of kingship blurred the distinctions between private obligations and public authority, to the point of public law fading into private law, or rather the law at large. Treaty practice reflected this in the highly personal character of political treaties. These were rather compacts between persons than between polities. Medieval treaties were styled

internazionale nel Medio Evo (Milan: Giuffrè, 1940); H. Steiger, *Die Ordnung der Welt. Eine Völkerrechtsgeschichte des karolingischen Zeitalters (741 bis 840)* (Köln/Weimar/Vienna: Böhlau, 2010) and K.-H. Ziegler, *Die Beziehungen zwischen Rom und dem Partenreich. Eine Beitrag zur Geschichte des Völkerrechts* (Wiesbaden: Steiner, 1964).

[27] Under the papal bull *Per venerabilem* of 1202: X. 1.6.34. See, also, J. Canning, *Ideas of Power in the Late Middle Ages 1296–1417* (Cambridge: Cambridge University Press, 2011) and K. Pennington, *The Prince and the Law 1200–1600. Sovereignty and Rights in the Western Legal Tradition* (Berkeley, CA: University of California Press, 1993).

[28] M. Bellomo, *The Common Legal Past of Europe 1000–1800* (Washington, DC: Catholic University of America Press, 1995); J. Brundage, *Medieval Canon Law* (London: Longman, 1995); R. Lesaffer, *European Legal History: A Cultural and Political Perspective* (Cambridge: Cambridge University Press, 2009), pp. 192–288, and P. Stein, *Roman Law in European History* (Cambridge: Cambridge University Press, 1999), pp. 38–103.

as contracts between princes who undertook personal obligations to one another and committed themselves to impose these onto their subjects, vassals and adherents. Until the very end of the Middle Ages, this found its expression in the wordings of preambles and treaty clauses, the express stipulations about the validity of treaties for the successors of the treaty principals or the system of co-ratification whereby powerful subjects were directly bound to the treaty of their prince. This implied that there was no autonomous doctrine of the law of nations. Nevertheless, within the learned law at large were found numerous rules which were applied to relations between polities and matters of war, peace, diplomacy and trade. To this, the learned lawyers would refer with the Roman term *jus gentium*, a term that encompassed – as it had done for later Roman jurists – both universal (private) law and inter-polity law.[29]

In the highly legalised sphere of late-medieval inter- and trans-polity political and personal relations, thick layers of legal doctrines and customs pertaining to matters of war, peace, diplomacy and trade were developed. Because there was no autonomous body or doctrine of law of nations as yet, modern scholars have far and wide neglected this period and underestimated the impact of the Late Middle Ages on the formation of the modern law of nations. All this is also true for treaty law and practice. From the late eleventh century onwards, increasingly standardised as well as sophisticated treaty practices developed, as regards both material clauses and formalities. These did not develop in a relative juridical vacuum as in Antiquity but against the backdrop of a rich, pluralist and complex legal reality. Late-medieval treaty practice took inspiration from many sources. These included ancient and Germanic practices, feudal law, ecclesiastical arbitration and adjudication and above all the learned *jus commune* of canon and Roman law.[30] The blurring of the distinctions between the

[29] J. Canning, *The Political Thought of Baldus de Ubaldis* (Cambridge: Cambridge University Press, 1987), pp. 76–78; R. Lesaffer, 'Peace Treaties from Lodi to Westphalia' in Lesaffer (ed.), *supra* n. 22, pp. 9–41, at pp. 17–22; H. Mitteis, 'Politische Verträge des Mitterlalters' in H. Mitteis (ed.), *Die Rechtsidee in der Geschichte. Gesammelte Abhandlungen und Vorträge* (Weimar: Böhlau, 1957), pp. 567–611, at pp. 569–574. On the different meanings of *jus gentium*, see J. Waldron, *'Partly Laws Common to Mankind': Foreign Law in American Courts* (New Haven, CT: Yale University Press, 2012).

[30] The *jus commune* also encompassed some feudal law through the inclusion of the *Libri feudorum*, a compilation of feudal law, into the *Liber parvum*, the final part of the medieval collation of the Justinian codification.

'international' and the 'national' as well as between the private and public spheres allowed for the application of doctrines and concepts of private law to inter-polity relations. Thus the medieval civilians and canonists did not only take inspiration from the scarce references to Roman public international law in the Justinian collection for the formation of treaty doctrine. Much of what would become modern treaty law found its origins in the Roman law of contract and made its way into international treaty practice and doctrine thanks to the mediating role of the medieval *jus commune*.[31]

All this meant that medieval treaties played a lesser role in the constitution of international law and order. There were primarily, and often exclusively, instruments to settle particular disputes and create specific obligations between the treaty partners. They applied rather than created the *jus gentium*, although through standardised practice treaties remained a source for later treaties and thus, ultimately, for formal treaty law and material law of nations. All this explains why medieval treaties, regardless of the use of elaborate notarial forms with their repetitive language, were often short. Even one of the more extensive peace treaties, that of Brétigny between England and France of 8 May 1360, while being quite articulate on the details of the concrete undertakings of the parties, was relatively short as there was no need to explain the specific legal implications of the concepts and institutions referred to.[32]

Canon and civilian doctrine found its way into treaty practice through three main channels. Firstly, ecclesiastical courts played a significant role in the settlement of disputes about treaties. Because most treaties were confirmed by oath, disputes about the execution, interpretation and violation of treaties fell within the jurisdiction of the Church. Secondly, medieval rulers made use of notaries – who generally had been trained in Roman and/or canon law – to produce the written charters of treaties and their ratifications. Notarial practices played a significant role in the development of treaty practice and law. Some medieval notarial

[31] Mitteis, *supra* n. 29, at pp. 568–569; J. Muldoon, 'A Canonist Contribution to the Formation of International Law', *The Jurist*, 28 (1968), 265–279; J. Muldoon, 'The Contribution of Medieval Canon Lawyers to the Formation of International Law', *Traditio*, 28 (1972), 483–497; A. Wijffels, 'Early-Modern Scholarship on International Law' in A. Orakhelashvili (ed.), *Research Handbook on the Theory and History of International Law* (Chelthenham: Edward Elgar, 2011), pp. 23–60, at pp. 29–32, and K.-H. Ziegler, 'Die römische Grundlagen des europäischen Völkerrechts', *Ius Commune*, 4 (1972), 1–27.

[32] J. Dumont, *Corps universel diplomatique du droit des gens* (Vol. II.1) (Amsterdam/The Hague: Brunel/Husson & Levrier, 1726–1731), p. 7.

formularies include forms for specific kinds of treaties.[33] Thirdly, canonists as well as civilians were often asked for their legal advice on disputes of an international political nature. The collections of *consilia* of major commentators such as the fourteenth-century Italians Bartolus of Sassoferrato (1314–1157) and Baldus de Ubaldis (1327–1400) or their fifteenth- and sixteenth-century successors such as Andrea Alciato (1492–1550) include several advices relevant to the law of treaties or general treaty practice.[34]

For the whole of the Middle Ages, confirmation by oath remained the primary formality in the conclusion of treaties. This was not limited to treaties among Christians. Oaths were also used for treaties with Muslim rulers or, later, during the Age of Discoveries, with rulers outside Europe and the Middle East.[35] Within the Latin West, the oath-taking brought treaty-making within the sphere of the Catholic Church. The oath-taking did not only entail the invocation of the name of God but was generally performed in church and accompanied by religious gestures such as the touching of the Gospel, the Holy Cross or relics. Moreover, the confirmation of a treaty – or any pact such as private contracts – brought it squarely under the jurisdiction of the Church and its courts, including the highest one, the papal court. Whereas any promise triggered the jurisdiction of the Church *ratione peccati* (because of sin) *in foro interno* – in conscience and in the court of God at the Last Judgment – perjury was also a sin considered to be actionable *in foro externo* – leading to ecclesiastical sanction in the here and now.[36]

From Carolingian times onwards, the written form of treaties gained in importance. This was, in part, consequential to the emergence of a new method of treaty-making. In the Early Middle Ages, most treaties were directly made by the principals of the treaties – kings or other

[33] E.g. in G. Durantis (c. 1237–96), *Speculum iudiciale* (c. 1290), 4.1: *De treuga et pace*; see K.-H. Ziegler, 'The Influence of Medieval Roman Law on Peace Treaties' in Lesaffer (ed.), *supra* n. 22, pp. 147–161, at pp. 152–153.

[34] J. Mearns, 'A Consultation by Andrea Alciato on the Laws of War', *Legal History Rev.*, 90 (2014), 100–140.

[35] Alexandrowicz, 'Treaty and Diplomatic Relations', *supra* n. 9, at 294, and A. Nussbaum, 'Forms and Observance of Treaties in the Middle Ages and the Early Sixteenth Century' in G.A. Lipsky (ed.), *Law and Politics in the World Community: Essays on Hans Kelsen's Pure Theory and Related Problems in International Law* (Berkeley, CA: University of California Press, 1953), pp. 191–196, at p. 195.

[36] Papal decree *Ille novit* from Innocent III (1198–1216), X. 2.1.13. See, further, R. H. Helmholz, *The Spirit of Classical Canon Law* (Athens, GA: University of Georgia Press, 1996), pp. 162–163.

rulers – during a meeting. Oral commitment and confirmation by oath could thus take place on the spot, with the recording as the final outcome. Gradually, an alternative method – which had ancient precedents – emerged. By the end of the Middle Ages this superseded the old method and became the standard form of treaty-making. This new, composite method involved the negotiation of the treaties by representatives of the principals, followed by the confirmation or ratification by the principals through the taking of an oath. The latter was done separately by each of the treaty principals, generally in the presence of a representative of the treaty partner. This method implied the production of three sets of written charters: full powers, the treaty text concluded by the negotiators and the charters attesting the confirmation by oath of the treaty by each of the principals. These charters took the form of notarial instruments and were signed and sealed either by the principals, in the case of full powers and ratifications, or by the diplomatic representatives, in the case of the compromise text. It is hard to assess when and how the written instruments of ratification gained constitutive apart from evidentiary value, but it is safe to assess that by the twelfth or thirteenth century this was the case.[37] By consequence, written ratifications gained a dual function: on the one hand they offered evidence of the ratification by oath, while on the other hand they had constitutive value for the consent and commitment of the treaty parties.[38] During the Late Middle Ages, treaties were also made by princes upon their honour as king and knight. This made them binding under the code of chivalry.[39]

Historians of international law have questioned what made the treaty binding under the law of nations. The German international lawyer Heinhard Steiger has put forward the view that whereas the oath made it binding under canon law, the written form made it so under the law of nations. For the Middle Ages, this misses the point as it neglects the inherent pluralist character of the *jus gentium*. There was no *jus gentium* as a self-sufficient, autonomous body of law. Instead, there was a mass of practices and doctrines that were themselves derived from a plurality of

[37] Steiger considers this to be already the case for some Carolingian treaties: *supra* n. 26, at pp. 386–415.

[38] L. Bittner, *Die Lehre von den völkerrechtlichen Vertragsurkunden* (Stuttgart/Berlin/Leipzig: Deutsche Verlagsanstalt, 1924); A. Z. Hertz, 'Medieval Treaty Obligation', *Connecticut JIL*, 6 (1991), 425–443, and Nussbaum, *supra* n. 35.

[39] A. Z. Hertz, 'Honour's Role in the International States' System', *Denver JILP*, 31 (2002), 113–156.

practices and doctrines. The oath made the treaty enforceable before ecclesiastical courts, while the oral commitment and the written form made it binding under canon law, feudal law, Roman law and traditional treaty practice. All these sources combine to form the law and practice of treaties under the *jus gentium* of the Late Middle Ages.[40]

2.3 Early Modern Age (1500–1815)

The first half of the sixteenth century was marked by major upheavals that caused the transformation of the international legal order of Europe over the century to follow. In the decades *after* the Peace Treaties of Westphalia (1648), a new international order would emerge, that of the modern States system and classical law of nations (1648–1815). The crisis of the international system during the sixteenth century had three causes. First, the Reformation caused half of Europe to reject the authority of the pope and of canon law and collapsed the very foundation of the unity of the Latin West and of its legal order. Second, the discoveries and conquests outside Europe challenged the relevance of canon and Roman law as authoritative sources for the law of nations. Third, powerful dynasties started a process of centralisation within what would become the sovereign States of Europe. It led to the final demise of the claims to universal authority in secular matters of pope and emperor and the gradual monopolisation of matters of war, peace and diplomacy by one type of polity to the exclusion of all others. Thus a sphere for a separate public international law was created.[41]

The crisis and transformation of the international legal order had its impact felt on treaty practice in three ways. Firstly, there was the monopolisation of treaties by the emerging sovereign States. This led to the emancipation of treaty law as part of the newly emerging law of nations from general contract law. This was, among others, reflected in the rapid disappearance of the last remnants of the personal character of medieval treaties such as personal co-ratification or the limitations of treaty

[40] Lesaffer, *supra* n. 29, at pp. 22–29; H. Steiger, 'Bemerkungen zum Friedensvertrag von Crépy en Laonnais vom 18. September 1544 zwischen Karl V. und Franz I', in U. Beyerlin, M. Bothe, R. Hofmann and E.-U. Petersmann (eds.), *Recht zwischen Umbruch und Bewahrung: Völkerrecht–Europarecht–Staatsrecht: Festschrift für Rudolf Bernhardt* (Berlin: Springer, 2nd ed., 1995), pp. 249–265, at pp. 256–260.

[41] R. Lesaffer, 'The Grotian Tradition Revisited: Change and Continuity in the History of International Law', *BYbIL*, 73 (2002), 103–139, and R. Lesaffer, 'The Classical Law of Nations (1500–1800)' in Orakhelashvili (ed.), *supra* n. 31, pp. 408–440.

duration to the life of the signatory princes. Although until the very end of the *Ancien Régime*, treaties would still mention the princes and not their polities as treaty partners, by the late seventeenth century it was clear that the princes acted as constitutional agents of their polities binding their subjects directly to the treaty. This shift found expression in the increasing use of titles rather than names of princes.[42] The emergence of an autonomous body of 'public' treaty law also allowed for treaty law to materially divert from general contract law. The debates, in doctrine and practice, about the application of the *clausula rebus sic stantibus* – which came from medieval theology and learned contract law – and the refusal to apply to public treaties the exception of duress (*vis metusve*) which was generally applied to contracts under Roman law are prime illustrations thereof.

Secondly, the Reformation collapsed the major pillars under the structure of the international order of the Middle Ages: canon law and ecclesiastical jurisdiction. This, together with the more gradual erosion of the universal authority of Roman law and of feudal law, threw the emerging States of Europe upon their own devices to develop and articulate international legal rules. Thus custom and treaties came once again to the fore as major constitutive sources of the law of nations to the detriment of doctrine. The backbones of the new political and legal order of Europe which emerged in the late seventeenth and eighteenth centuries were for a large part to be found in treaties, in particular treaties of peace, alliance and commerce. The great peace compacts made at important, often multi-party peace conferences, such as those of Westphalia (1648), Nijmegen (1678–1679), Ryswick (1697), Utrecht-Rastadt-Baden (1713–1715), Aachen (1748) or Paris-Hubertusburg (1763), laid out the basis for the peace ordering of Europe. While the compromises reached there were mainly of a political nature, they were also vested on a consent about the foundational principles and values which through the treaties gained normative value. The inscription of the principle of the 'balance of Europe' in some of the Utrecht peace treaties is a prime example thereof.[43] It must be noted that whereas most of these major peace compacts were negotiated at multilateral peace conferences ending

[42] W. G. Grewe, *The Epochs of International Law* (Berlin: De Gruyter, 2000), p. 361, and Lesaffer, *supra* n. 29, at pp. 22–29.

[43] Most clearly in the Peace Treaties of 13 July 1713 between Great Britain and Spain (Art. 2) as well as between Savoy and Spain (Art. 3): 28 CTS 269 and 28 CTS 295 respectively. See, further, F. Dhondt, 'From Contract to Treaty: the Legal Transformation of the Spanish Succession, 1659–1713', *J. History Int'l L.*, 13 (2011), 347–375, and A. Osiander, *The States*

wars which involved multiple belligerents and their auxiliaries, with the exception of the Aachen Peace Treaty of October 1748,[44] these peace settlements were actually laid down in bilateral treaties between the different belligerents. Nevertheless, the constitutional role of these treaties for the over-arching European political and legal order was materialised in different ways, such as through the inclusion of similar or literally the same material clauses, cross references between treaties made at the same conference or references to older peace settlements.[45]

But treaties were also material in the development of customary law of nations, both in the field of treaty law as of other material fields of law. Treaties were of particular importance for the laws of maritime commerce, neutrality and the *jus post bellum*, especially with regard to the treatment of private property, prisoners of war and surrendered territories. Between the sixteenth and early eighteenth centuries, treaties became increasingly elaborate legal documents, often fine-tuning the implications of the parties' concrete undertakings in great detail.

The main source of inspiration for the negotiators and drafters of early-modern treaties were, without any doubt, earlier treaties. Doctrine, albeit not without significance, came a distant second. This does not serve, however, to deny that the doctrinal concepts and institutions developed by late-medieval civilians and canonists, which had made their way into treaty practice before, survived in early-modern practice. Throughout the period which runs from the Late Middle Ages to the nineteenth century, one can see the gradual development of concepts, institutions and rules of law in the fields of the law of treaties, navigation, commerce, neutrality and peace-making through strings of consecutive treaties. These traditions follow a process whereby clauses first become more elaborate and detailed but are later standardised and abridged, whereby use is made of a more fixed terminology. The first phase, generally speaking, runs to the late seventeenth century; the second phase covers the eighteenth and nineteenth centuries.[46]

System of Europe 1640–1990: Peacemaking and the Conditions of International Stability (Oxford: Oxford University Press, 1994).

[44] 38 CTS 297.

[45] K. Marek, 'Contribution à l'étude de l'histoire du traité multilatéral' in E. Diez, J. Monnier, J. P. Müller *et al.* (eds.), *Festschrift für Rudolf Bindschedler: am 65. Geburtstag am 8. Juli 1980* (Bern: Stämpfli, 1980), pp. 17–39, and S. C. Neff, 'Peace and Prosperity: Commercial Aspects' in Lesaffer (ed.), *supra* n. 22, pp. 365–381, at pp. 367–370.

[46] J. Fisch, *Krieg und Frieden im Friedensvertrag. Eine universalgeschichtliche Studie über die Grundlagen und Formelemente des Friedensschlusses* (Stuttgart: Klett-Cotta, 1979),

One can dispute whether these traditional practices constitute customary law. From the perspective of a strict definition of customary law, for many cases the answer it in the negative as a clear indication of *opinio juris* is lacking. The emergence of customary practices in treaty-making did not necessarily lead to the creation of customary law. Their basis was ultimately their acceptance in each and every particular treaty. Treaty parties had the right to divert from tradition while its acceptance did not reflect upon third parties. In this sense, one should rather speak of customary practice, or the *mores* or lore of treaty-making, than of customary law. But, on the other side, there are instances whereby this *mores* or lore did lead to the creation of customary law. Some rules were so widely respected that one can say that they were considered binding. The clearest expression for this are the cases in which a rule came to be considered as simplified in a treaty, for example the concept of amnesty from peace treaties. Whereas during most of the Early Modern Age, it was customary to include a stipulation of amnesty for all the acts related to the war, by the nineteenth century it was generally accepted that this was silently implied in every peace treaty.[47]

Thirdly, between the early sixteenth and late seventeenth centuries, a major transformation in relation to the forms of treaty-making occurred: the disappearance of the oath. The Reformation and the end of the religious unity of the West did not spell an immediate end to the confirmation by oath, certainly not among Catholics and even not between princes of different religions. Nevertheless, the rejection by somewhat half of Christian Europe of ecclesiastical jurisdiction radically eroded its usefulness. As canon law could no longer serve as a source of authority for the law of nations and ecclesiastical courts were no longer of use to enforce treaties, the oath did not add much more to the safeguard of the binding character of a treaty than the written form. The gradual secularisation of international relations which followed the era of the wars of religion did the rest. Within a few decades from the beginning of the Reformation, all references to canon law or ecclesiastical jurisdiction and sanction which had been usual in older treaties disappeared from

pp. 536–537, and R. Lesaffer, 'Alberico Gentili's *ius post bellum* and Early Modern Treaties' in B. Kingsbury and B. Straumann (eds.), *The Roman Foundations of the Law of Nations: Alberico Gentili and the Justice of Empire* (Oxford: Oxford University Press, 2010), pp. 210–240, at pp. 212–213.

47 R. Lesaffer, 'Peace Treaties and the Formation of International Law' in B. Fassbender and A. Peters (eds.), *The Oxford Handbook of the History of International Law* (Oxford: Oxford University Press, 2012), pp. 71–94, at pp. 80 and 89.

treaties, even among Catholics. By the late seventeenth century, the practice of oath-taking itself withered and stopped. The written form of ratification remained.[48]

The crisis of the international system during the sixteenth century triggered intense scholarly debate on the law of nations. Between the early sixteenth and the mid-seventeenth century, an autonomous jurisprudence of the law of nations with its own literature emerged. The emancipation of the law of nations from jurisprudence at large went hand in hand with the gradual monopolisation of international relations by the emerging sovereign States.[49] The demise of the *jus commune* as the ultimate frame of reference and source of authority for the *jus gentium* forced sixteenth- and seventeenth-century theologians and lawyers to indicate an alternative basis for the law of nations. This was to be natural law. In his *De jure belli ac pacis libri tres* of 1625, Hugo Grotius (1583–1645) crystallised earlier ideas into what was to be the mainstream theory of the law of nature and of nations of the later seventeenth and eighteenth centuries. Grotius distinguished two bodies of law of nations: the primary law of nations which was natural law applied to relations between polities and the secondary or voluntary law of nations which was manmade and based on consent.[50] Later writers, such as Christian Wolff (1679–1754) and Emer de Vattel (1714–1767), would distinguish three categories of manmade law of nations. Firstly, there was conventional law based on express consent; secondly, customary law based on tacit consent; and thirdly, general voluntary law of nations based on presumed consent. Whereas the first two were particular law and only applied to those polities which had effectively given consent, the third was general. Wolff and Vattel retained a clear link between the voluntary law of nations and natural law. In their view, general consent could not be presumed for a rule which contravened natural law.[51]

[48] D. Gaurier, *Histoire du droit international: Auteurs, doctrines et développement de l'Antiquité à l'aube de la période contemporaine* (Rennes: Presses Universitaires de Rennes, 2005), pp. 334–337; R. Lesaffer, *Europa: een zoetocht naar vrede 1453–1763 en 1645–1997* (Leuven: Leuven University Press, 1999), pp. 406–414, and Lesaffer, *supra* n. 29, at p. 27.

[49] Wijffels, *supra* n. 31, at pp. 28–60.

[50] H. Grotius, *De jure belli ac pacis libri tres* (Vol. I) (1625) (Oxford: Clarendon Press, 1925) (F. W. Kelsey trans.), Prolegomena.

[51] C. Wolff, *Jus Gentium methodo scientifica pertractatum* (Vol. I) (1748) (Oxford: Clarendon Press, 1934) (J. H. Drake trans.), Prolegomena; E. de Vattel, *Le droit des gens*

Mainstream doctrine made consent into the very foundation of the positive law of nations. According to Grotius and others, its ultimate basis was to be found in the natural law maxim of the binding force of all promises.[52] The doctrine of the enforceability of all promises, including nude pacts, had been articulated by medieval canonists from the conjunction of Christian moral precepts with the Roman law of contract. It was recycled by the theologians and jurists of the sixteenth century and by the natural lawyers of the seventeenth century into the jurisprudence of the law of nature and of nations and forged into the modern doctrine of consent as the basis for manmade order and law. According to the mainstream writers of the law of nations since the later seventeenth century, consent was constitutive of the binding character of treaties, whatever their form. In reality, it was almost always expressed in the form of a written ratification by the principal.[53] Whereas most early-modern writers of the law of nations did underscore that treaties could only create law between treaty parties themselves, writers of the later eighteenth and nineteenth centuries expressly pointed out that customary treaty practice formed a source for the general law of nations as it gave evidence of customary law.[54]

The demise of the authority of the *jus commune* did not cause the demise of many of its concrete doctrines with relation to the law of nations in general or treaty law in particular. Natural law served as a conduit to recycle many of the doctrines of medieval *jus gentium* but also of medieval canon law and private Roman law which had not been applied to international relations before to be operated into this field

ou principes de la loi naturelle (1758) (Washington, DC: Carnegie Institution, 1916) (C. G. Fenwick trans.), Préface and Préliminaires; P.-M. Dupuy, 'Vattel et le droit des traités' in V. Chetail and P. Haggenmacher (eds.), *Vattel's International Law from a XXIst Century Perspective* (Leiden: Martinus Nijhoff, 2011), pp. 151–166; R. Lesaffer, 'A Schoolmaster Abolishing Homework? Vattel on Peacemaking and Peace Treaties' in Chetail and Haggenmacher (eds.), *ibid.*, pp. 353–386, at pp. 359–361, and S. C. Neff, 'A Short History of International Law' in M. D. Evans (ed.), *International Law* (Oxford University Press, 4th ed., 2014), pp. 3–28, at pp. 9–12.

[52] Grotius, *supra* n. 50, at Prol. 8.

[53] Wolff, *supra* n. 51, at 4.375–4.378 and 4.548–4.550; Vattel, *supra* n. 51, at 2.12.152–2.12.164 and 2.15.222–2.15.234; R. Hyland, '*Pacta Sunt Servanda*: A Mediation', *Virginia JIL*, 33 (1993–1994), 405–433; Lesaffer, *supra* n. 10, and H. Wehberg, '*Pacta Sunt Servanda*', *AJIL*, 53 (1959), 775–786.

[54] G. F. von Martens, *Summary of the Law of Nations Founded on Treaties and Customs of the Modern Nations of Europe* (Philadelphia: T. Bradford, 1795) (W. Cobbett trans.), pp. 2–5; W. O. Manning, *Commentaries on the Law of Nations* (London: Sweet, 1839), p. 74, and H. Wheaton, *Elements of International Law with A Sketch of the History of Science* (Philadelphia, PA: Carey, Lea and Blanchard, 1836), pp. 40–42.

now. In the great treatises of the law of nations of the seventeenth and eighteenth centuries, an autonomous doctrine of treaty law, separate from or as a species of general contract law, was formed. In large part, it drew on older doctrines of treaties and contract.[55] Apart from formal treaty law, by far the most attention was given to peace treaties.[56]

2.4 Modern Age (1815–1969)

The gradual rise of legal positivism and the material extension of international relations following from the Industrial Revolution combined to enhance the role and function of treaties in the organisation of international society and the creation of international law. The successful rebellion of the Northern and Southern American colonies around 1800, the inclusion of such powers as the Ottoman Empire, Japan and China in the international community and the processes of colonisation and decolonisation led to the gradual formation of one global order.[57] This process was achieved by the end of the 1960s, after the great wave of decolonisation and the articulation of the doctrine of peaceful co-existence by the Soviet-Union.

Apart from the enhanced functionality of treaties, the nineteenth and early twentieth centuries saw two major, interconnected, changes in treaty practice. Firstly, there was the emergence of multilateral conventions. Although multilateral treaties already occurred in Antiquity, the vast majority of historical treaties were bilateral. This was even the case for treaties emerging from general conferences such as the major peace settlements of the seventeenth and eighteenth centuries. This changed with the Vienna Peace Congress of 1814–1815, where the dictates of interest of the anti-Napoleonic coalition prompted the switch to multilateral peace agreements. Whereas opportunism would continue to rule the choice for bi- or multilateral treaties in major peace settlements – as with the Paris Peace Conference at the end of both World War I and II (1919–1920 and 1947) where multilaterism was only applied to the side of the winning coalition – the use of multilateral conventions expanded to other types of treaties. The creation of international organisations at the

[55] e.g. Grotius, *supra* n. 51, at 2.11–2.16.

[56] Lesaffer, *supra* n. 46, at pp. 210–220, and Wijffels, *supra* n. 31.

[57] H. Bull and A. Watson (eds.), *The Expansion of International Society* (Oxford: Clarendon Press, 1984) and Y. Onuma, 'When Was the Law of International Society Born? An Inquiry of the History of International Law from An Intercivilizational Perspective', *J. History Int'l L.*, 2 (2000), 1–66.

global and regional level in the twentieth century gave the multilateral conferences and conventions an institutional framework.[58]

Secondly, there was the emergence of law-creating treaties – *traités-lois* – in the form of multilateral conventions for the codification of customary law and/or the creation of new rules of international law. The Vienna Congress also formed the setting for the first multilateral *traités-lois*, more specifically in relation to the slave trade, the international status of rivers and diplomats. The multilateral character of these treaties, the involvement of a large number of States and the fact that these conventions often emerged in the context of the League of Nations or the United Nations have fostered the general acceptance of the doctrine that these treaties themselves render evidence of general customary international law, allowing them to transcend the rule of *pacta tertiis nec nocent nec prosunt*.[59] From the late nineteenth century onwards up to the 1969 Vienna Convention of the Law of Treaties, various substantive areas of international law have been codified, from traditional fields such as diplomatic law, trade law and the laws of war and treaty law itself to new fields such as transport, communications, private international law, labour and human rights.[60]

Lastly, one change in relation to the form of treaties from the twentieth century must be pointed out. Article 18 of the 1919 Covenant of the League of Nations stipulated the obligation for treaty parties to register every future treaty with the Secretariat of the League and made its binding character conditional upon fulfilment of this formality.[61] In this way, it was hoped to make an end to the practice of secret treaties.[62] The 1945 United Nations Charter, in its Article 102, watered down the effects of

[58] G. Fitzmaurice, 'The Juridical Clauses of the Peace Treaties', *Hague Recueil*, 73 (1948), 259–367; Marek, *supra* n. 45; Osiander, *supra* n. 43, at pp. 166–315, and H. Steiger, 'Peace Treaties from Paris to Versailles' in Lesaffer (ed.), *supra* n. 22, pp. 59–99.

[59] C. Chinkin, *Third Parties in International Law* (Oxford: Clarendon Press, 1993); E. David, 'Article 34 (1969)' in O. Corten and P. Klein (eds.), *The Vienna Conventions on the Law of Treaties: A Commentary* (Vol. II) (Oxford: Oxford University Press, 2011), pp. 887–896, and B. Simma, 'From Bilateralism to Community Interest in International Law', *Hague Recueil*, 250 (1994–VI), 217–384.

[60] 'The Progressive Development of International Law', *AJIL. Supp*., 41 (1947), 32–49; 'The Progressive Development of International Law by the League of Nations', *AJIL Supp*., 41 (1947), 49–65; Grewe, *supra* n. 42, at pp. 606 and 663–665; F. Honig, 'Progress in the Codification of International Law', *Int'l Aff*., 36 (1960), 62–72; M. O. Hudson, 'The Progressive Codification of International Law', *AJIL*, 20 (1926), 655–669, and M. O. Hudson, 'The Development of International Law Since the War', *AJIL*, 22 (1928), 330–350.

[61] 225 CTS 188.

[62] The banning of secret treaties featured in President Woodrow Wilson's Fourteen Points of Jan. 1918.

non-registration to the non-invocability before organs of the UN.[63] But this has not been consequentially applied.[64]

3 The Historic Functions of Treaties in International Law

This section offers a survey of the main historic functions of treaties through a classification of treaties by their content.[65]

3.1 Treaties Establishing Friendly Relations in General Terms

A fairly general consent among historians now reigns that treaties were never the exclusive or even foremost instrument for the peoples of Antiquity to establish initial relations. From the very beginnings of recorded history, treaties were mainly used to specify relations in terms of concrete obligations. Nevertheless, general treaties of friendship which only stipulate peace and friendship in the vaguest terms have existed since Antiquity and continue to exist. The concept of international friendship which emerges from these treaties shows a remarkable continuity. It implies a general commitment not to harm but to favour one another and one another's subjects. In many cases, general treaties of friendship include more specific consequences of 'friendship', such as the duty to include one another in future alliances, the recognition of each other's boundaries, the obligation to extend the protection of the law to each other's subjects or the concrete organisation of cooperation in particular fields.[66]

3.2 Treaties Ending War and Settling Disputes

Treaties have been used as instruments to end war since the remotest times. The Treaty between Lagash and Umma from the twenty-fourth

[63] 1 UNTS 16.

[64] A. Aust, *Modern Treaty Law and Practice* (Cambridge: Cambridge University Press, 3rd ed., 2013), p. 303, and A. Hinojal-Oyarbide and A. Rosenboom, 'Managing the Process of Treaty Formation: Depositaries and Registration' in D. B. Hollis (ed.), *The Oxford Guide to Treaties* (Oxford: Oxford University Press, 2012), pp. 248–276.

[65] For a survey of collections of historical treaties: P. Macalister-Smith and J. Schwietzke, *Treaties, Treaty Collections and Documents on Foreign Affairs: From Sun King Suppilulima I to the Hague Peace Conferences of 1899 & 1907. An Annotated Bibliography* (Berlin/Munich: AjBD, 2002).

[66] The latter in the 1963 Treaty of Friendship between France and the Federal Republic of Germany: 821 UNTS 338; see, further, Lesaffer, *supra* n. 15, at p. 94, and Paradisi, *supra* n. 15.

century ended a military conflict. The first peace treaty between equal partners is the Egyptian-Hittite Treaty of Kadesh from the early thirteenth century BC.[67] Since then, peace treaties have been the common means to end wars in all regions of the world.

Already in classical times, a distinction was made between perpetual treaties and treaties which were limited in time. Among the Greek city-states, peace treaties were generally concluded for a limited number of years. Peace treaties between Islamic rulers and Christian rulers were also made for a set period of time, generally ten years, in respect of Islamic doctrine. From the eighteenth century, this practice was gradually disregarded and perpetual peace treaties were made.[68] In late-medieval and early-modern doctrine, the perpetual character of peace treaties gained specific juridical meaning. Rather than a vague and seemingly naïve undertaking by the treaty partners never to resort to war again, it only exhausted the right of the former belligerents to resort to force in the future over the disputes settled in the peace treaty. It does not infringe upon the rights of treaty partners to resort to war for other causes.[69] This doctrine has become obsolete under the present *jus contra bellum*.

Generally speaking, peace treaties have three functions and include three different sets of stipulations. A first set of clauses settles the claims and disputes between the belligerents or provides for peaceful means to settle them in the future. The second set of clauses puts an end to the state of war and deals with its consequences. These clauses relate to booty, confiscated property, prisoners of war, restitution of occupied territories and generally the lifting of wartime measures. The third set concerns the regulation of future peaceful relations between the treaty parties and their subjects. These clauses extend to matters of trade and the legal position of subjects. In this category fall the stipulations which serve to make the peace more sustainable and deal with the consequences of the violation of treaty clauses. During the Early-Modern Age, peace treaties among European powers became elaborate and detailed with regards

[67] Altman, *supra* n. 1, at pp. 123–134.

[68] M. Khadduri, *War and Peace in the Law of Islam* (Baltimore, MD: Johns Hopkins University Press, 1955); G. Vismara, 'Impium Foedus: Le origini della respublica christiana' in G. Vismara, *Scritti di storia giuridica* (Vol. VII) (Milan: Giuffrè, 1989), pp. 3–115, and K.-H. Ziegler, 'The Peace Treaties of the Ottoman Empire with European Christian Powers' in Lesaffer (ed.), *supra* n. 22, pp. 338–364.

[69] B. Klesmann, *Bellum solemne. Formen und Funktionen europäischer Kriegserklärungen des 17. Jahrhunderts* (Mainz: Zabern, 2007) and R. Lesaffer, E.-J. Broers and J. Waelkens, 'From Antwerp to Munster (1609/1648): Peace and Truce under the Law of Nations' in Lesaffer (ed.), *supra* n. 3, pp. 233–255.

the second and third sets of clauses. This change was consequential upon the fact that, during this period, wars became a far more encompassing state of affairs than before, involving the comprehensive disruption of normal relations between the belligerents. Peace treaties thus became crucial instruments spelling out the legal implications of ending the state of war and restoring the state of peace. By consequence, they are essential informative and constitutive sources for the laws of peace – in the sense of the laws regulating the state of peace – among former belligerents. Many peace treaties included detailed stipulations regarding commerce and navigation. From the seventeenth century onwards, it became customary to relegate these stipulations to separate treaties of friendship, commerce and navigations – the so-called FCN treaties – accompanying the proper peace treaty.[70]

Since the end of World War II, peace-making practice has undergone remarkable changes. Firstly, formal peace treaties no longer played the dominant role in the ending of inter-State armed conflicts. In some cases, as that of Germany after World War II, this was due to political circumstances. But in general terms, this is consequential to the emergence of the *jus contra bellum*. The outlawing of war in the 1928 Briand-Kellogg Pact[71] and of force in the Charter of the United Nations of 1945 has caused a sharp decline in the number of formally declared wars. In the Charter Era, the lines between the state of war and the state of peace have been blurred, and wars are again – as they were in the Middle Ages – perceived of in terms of separate acts of hostilities rather than of the complete disruption of the normal, peaceful relations. For this reason, the traditional peace treaty has fallen into relative disuse. But whereas this is often seen as the demise of peace treaty practice, it can as readily be considered part of a process of its transformation. Formal peace treaties marking the transit from state of war to state of peace may have become relatively rare but have not disappeared altogether.[72] As legal forms and concepts of inter-State armed conflict became more varied, legal forms and contents of agreements to end them likewise became more varied. Some conflicts ended with an armistice and/or a preliminary agreement whereby relations quickly or gradually regained a level of normalcy.[73]

[70] Lesaffer, *supra* n. 46, at pp. 210–214, and Neff, *supra* n. 45.
[71] 94 LNTS 57.
[72] Such as Art. 1 of the 1994 Treaty of Arava: ILM, 34 (1995), 46–66.
[73] Under current international law, an armistice 'denotes a termination of hostilities; even though it does not introduce peace in the full sense of that term'. See Y. Dinstein, *War, Aggression and Self-Defence* (Cambridge: Cambridge University Press, 6th ed., 2017), p. 44.

In other cases, treaties of friendship organising aspects of the relations between belligerents were used without a formal end to the war being expressly declared.

Secondly, the years since 1945 have been marked by a proliferation of intra-State armed conflicts, in which third powers were often involved. In this context, hundreds of peace agreements were made. These agreements take the form of international treaties but are mostly of a hybrid nature because they span inter- and intra-State affairs. More than being instruments of conflict resolution, current peace agreements are as much instruments of constitutional formation that break through the confines of domestic and international order.[74] They incorporate detailed regulations of constitutional (re-)formation at the State level.

Thirdly, next to State building, another important issue has come to expand the concern of peace-making – or peace building as it is now called – and widened the domain of the *jus post bellum*: the protection of human rights. This has started with the inclusion of stipulations on minority rights in the late nineteenth century.[75] By the late twentieth century, peace agreements incorporate stipulations on general human rights, including political and economic rights as well as on the prosecution of violations of international humanitarian law.[76]

Fourthly, peace-making turned into a drawn-out process of peace building, involving a series of agreements and documents. This was not completely new as even in the Early-Modern Age use was made of armistices and preliminary peace treaties in preparation of the peace treaty or of additional treaties detailing particular aspects of the peace process. But then, there had always been a formal peace treaty at the centre which marked the sudden reversion from war to peace. As war and peace have become relative concepts, so the notion of an abrupt change transit from war to peace has given way to that of a transition process.[77]

[74] There are historical precedents for this, the Peace Treaties of Westphalia of 24 Oct. 1648 actually being the most significant ones, although this has been completely overlooked by the framers of the Westphalian myth. R. Lesaffer, 'The Westphalian Peace Treaties and the Development of the Tradition of Great European Peace Settlements prior to 1648', *Grotiana*, 18 (1997), 71–95, and H. Steiger, 'Der Westfälische Frieden – Grundgesetz für Europa?' in H. Duchhardt (ed.), *Der Westfälische Frieden. Diplomatie, politische Zäsur, kulturelles Umfeld, Rezeptiongeschichte* (Munich: Oldenbourg, 1998), pp. 33–80.

[75] 1878 Treaty of San Stefano, 152 CTS 395, and 1878 Treaty of Berlin, 153 CTS 171.

[76] C. Bell, *Peace Agreements and Human Rights* (Oxford: Oxford University Press, 2000).

[77] C. Bell, *On the Law of Peace: Peace Agreements and the* Lex Pacificatoria (Oxford: Oxford University Press, 2008) and C. Stahn and J.K. Kleffner (eds.), Jus Post Bellum: *Towards a Law of Transition from Conflict to Peace* (The Hague: T.M.C. Asser Press, 2008).

Next to peace treaties, there are also treaties which settle legal claims and disputes between polities without them having resorted to war. This can be considered a separate category closely associated by its function to peace treaties.[78]

3.3 *Treaties Regulating Warfare*

Treaties between belligerents or non-belligerents to regulate the conduct of war are also a common occurrence in human history. Under this category fall proper treaties between the 'sovereign' rulers of polities as well as agreements between commanders in the field. Wartime treaties can be divided in five subgroups according to their content. These are (i) agreements concerning prisoners of war; (ii) capitulations of armies, towns and fortresses; (iii) agreements restricting violence against certain places and categories of persons, often including stipulations about garrison rights and financial contributions; (iv) agreements about the rights of third powers and their subjects, mainly concerning neutral trade and (v) armistices and truces. Agreements about the rights of neutral powers and non-belligerents could be made either between belligerents and non-belligerents or among non-belligerents as in the case of the armed neutralities of the late seventeenth and eighteenth centuries.[79] The distinction between truces and armistices roots back to ancient practice. It was first elucidated as a point of doctrine by the civilians of the Late Middle Ages. Whereas an armistice (*indutiae*) is a mere cessation of hostilities for a restricted period of time – from hours to a few years – and often limited to a certain theatre of war, a truce (*treuga*) is a peace treaty limited in time. It can stretch to the almost complete suspension of the state of war in all its practical consequences but reserves belligerents the right to resume war for the same causes after its expiration.[80]

[78] Fisch, *supra* n. 46; J. Fried (ed.), *Träger und Instrumentarien des Friedens im hohen und späten Mittelalter* (Sigmaringen: Jan Thorbecke Verlag, 1996); Lesaffer, *supra* n. 47; H. Steiger, 'Friede in der Rechtsgeschichte' in W. Augustyn (ed.), *PAX. Beiträge zu Idee und Darstellung des Friedens* (Munich: Scaneg, 2003), pp. 11–62, and K.-H. Ziegler, 'Friedensverträge im römischen Altertum', *Archiv des Völkerrechts*, 27 (1989), 45–62.

[79] S. C. Neff, *The Rights and Duties of Neutrals: A General History* (Manchester: Manchester University Press, 2000), pp. 39 and 71–74.

[80] M. H. Keen, *The Laws of War in the Late Middle Ages* (Aldershot: Routledge, 1965); J.-M. Mattéi, *Histoire du droit de la guerre (1700–1819): Introduction à l'histoire du droit international* (Aix-en-Provence: Presses Universitaires d'Aix-Marseille, 2006); J. F. Witt, *Lincoln's Code: The Laws of War in American History* (New York: Free Press, 2012); J. Q. Whitman, *The Verdict of Battle: The Law of Victory and the Making of Modern War*

3.4 *Treaties of Alliance*

Treaties have been used to forge alliances between polities since pre-classical Antiquity. Their major historic function is to secure the treaty partner's support – military or otherwise – during an on-going or future war. Alliance treaties form an important source of information about the *jus ad bellum* as it was accepted in the practice of a certain period or civilisation. The vast majority of alliance treaties are limited in time or directed at specific enemies. They can be general and stipulate the treaty parties' duty to aid one another in war in general terms – as the Greek and Roman formula of stating that the parties would be 'friends of friends and enemies of enemies' – or they can specify very concrete obligations in terms of the number of troops or amount of money an ally had to provide. A distinction can be made between offensive and defensive alliances. Most treaties do not stipulate a concrete *casus foederis*, but it is generally implied in the very notion of defensive alliance treaties that prior violence needs to have been used against the ally. In several periods of history, alliance treaties formed an essential part of the security management of great powers and were part of the foundations of international order, as in classical Greece, the Hellenistic world, the Roman Republic and Early Empire as well as in Europe for the whole period running from the Renaissance to the Cold War. In these times, alliances often became multilateral networks, at times even taking the form of multilateral treaties such as the Quadruple Alliance of 1718 or, more recently, the alliances of the Cold War. In some periods, as during and after the Cold War, alliances have taken on a more permanent character.[81] In the practice of Early Modern Europe, alliances did not always force treaty parties to resort to war but could also provide for aid as an auxiliary power. This implied that the ally would render aid to his treaty partner without declaring war. This aid could include arms deliveries, financial subsidies and even direct military support.[82]

(Cambridge, MA: Harvard University Press, 2012) and K.-H. Ziegler, 'Kriegsverträge im antiken römischen Altertum', *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung*, 102 (1985), 40–90.

[81] E.g. NATO which was made permanent in 1999, but also the bilateral alliances between the USA and Japan or South Korea.

[82] Gruen, *supra* n. 4, at pp. 13–53; Lesaffer, *supra* n. 48, at pp. 215–273, 443–485 and 551–595; S. Oeter, 'Neutrality and Alliances' in Chetail and Haggenmacher (eds.), *supra* n. 51, pp. 335–352; Steiger, *supra* n. 26, and K.-H. Ziegler, 'Das Völkerrecht der römischen Republik' in H. Temporini (ed.), *Von den Anfängen Roms bis zum Ausgang der Republik, Austieg und Niedergang der römischen Welt. Geschichte und Kultur Roms im*

3.5 *Treaties of Subjection and Empire*

From the earliest beginnings, treaties have been used to create or confirm relations of submission between polities. In fact, the very oldest treaty on record between Lagash and Umma was one of subordination. The Greeks and the Romans made common use of alliance treaties (συμμαχια, *foedus*) to submit other polities or people to their power. 'Unequal' treaties could stipulate the payment of tribute or one-sided duties of military aid and even, factually or legally, limit the right of the subject power to wage an independent foreign policy. A radical form of submission is the Roman *deditio*, whereby a foreign polity subjected itself to Roman power to the point of extinguishing its existence as a separate entity. The *deditio* was not properly a treaty as it did not create obligations between independent polities. In many cases, the *deditio* was often followed by a Roman decision – whether or not confirmed by treaty – to re-establish the polity as an ally and client State.[83] Until its legal consolidation around 200 AD, the Roman Empire was in fact and law a network of alliances centred on a hegemonic power and not a true empire. Its legal structure can rather be compared to the 1955 Warsaw Pact and the Soviet Bloc in the Cold War than to the European colonial empires of the nineteenth century.[84]

Particular use was made of treaties by European powers in the eras of colonisation and imperialism, although their relative importance as an instrument of territorial acquisition differed by period, region and colonial power.[85] The two major forms were treaties of cession, whereby the political government of territories and their inhabitants were passed over to the colonial power, and treaties of protectorate, whereby the indigenous ruler retained his power in internal affairs but relegated foreign policy to the imperial power. In practice, the lines between these two types of treaties were often blurred by the colonising powers, as were the

Spiegel der neueren Forschung (Berlin/New York: De Gruyter, 1972), pp. 68–114, at pp. 90–94.

[83] D. Nörr, *Aspekte des römischen Völkerrechts. De Bronzetafel von Alcantara* (Munich: Bayerische Akademie der Wissenschaften, 1989) and Ziegler, *supra* n. 82, at pp. 94–96.

[84] P. J. Burton, *Friendship and Empire: Roman Diplomacy and Imperialism in the Middle Republic (353–146 BC)* (Cambridge: Cambridge University Press, 2011); R. Kallett-Marx, *Hegemony to Empire: The Development of the Roman Imperium in the East from 148 to 62 BC* (Berkeley, CA: University of California Press, 1995) and A. Lintott, *Imperium Romanum: Politics and Administration* (London: Routledge, 1993).

[85] J. Fisch, *Die europäische Expansion und das Völkerrecht. Die Auseinandersetzungen und dem Status der überseeischen Gebiete vom 15. Jahrhundert bis zur Gegenwart* (Stuttgart: Streiner, 1984) and P. Seed, *Ceremonies of Possession in Europe's Conquest of the New World, 1492–1640* (Cambridge: Cambridge University Press, 1995).

lines between concessions of private property and rights by indigenous rulers and treaties of cession of sovereignty. Also, in some cases the colonising power argued that the instrument of cession was not a treaty under international law or even a convention at all as the colonised power lacked international legal personality, thus eroding any rights the colonised could derive from the instrument.[86] Also within this category fall treaties of devolution whereby the colonial power grants autonomy or independence to the colony and future relations are regulated.[87] Whereas treaties had been known and used by all major civilisations throughout world history, there had been important differences in relation to their use and significance. It was particularly during the Age of New Imperialism (1870–1920) that the Western model and law of treaties was imposed and globalised.[88]

3.6 Constitutional Treaties

Early-modern theory of social contract projected consent and contract to the very centre of constitutional theory and practice.[89] Together with theories of popular sovereignty, it formed the intellectual backdrop to the written constitutions of the Revolutionary Era (1776–1848). It also had its impact felt in the domain of international law. For the great writers of the law of nations of the seventeenth and eighteenth centuries, consent became the constitutive source of the positive law of nations. Several of the leading international lawyers of the nineteenth century considered the free will of States the ultimate foundation of the international

[86] Alexandrowicz, 'Treaty and Diplomatic Relations', *supra* n. 9; see, also, Alexandrowicz, *Law of Nations in the East Indies, supra* n. 9; Alexandrowicz, 'The Afro-Asian World and the Law of Nations', *supra* n. 9; Alexandrowicz, *European-African Confrontation, supra* n. 9; Anghie, *supra* n. 8, at pp. 32–114; J. R. Crawford, *The Creation of States in International Law* (Oxford: Oxford University Press, 2nd ed., 2006), pp. 282–329; Fisch, *supra* n. 85; P. McHugh, *The Maori Magna Carta: New Zealand Law and the Treaty of Waitangi* (Oxford: Oxford University Press, 1991), pp. 145–238, and W. A. M. van der Linden, 'New Imperialism (1870–1914) and the European Legal Traditions: A (Dis)Integrative Episode', *Maastricht JECL*, 19 (2012), 281–299.

[87] M. Craven, *The Decolonization of International Law: State Succession and the Law of Treaties* (Oxford: Oxford University Press, 2007), pp. 120–128, and Crawford, *supra* n. 86, at pp. 329–448.

[88] Apart from the works by Alexandrowicz, cited at *supra* n. 9, see, also, M. R. Austin, *Negotiating with Imperialism: The Unequal Treaties and the Culture of Japanese Diplomacy* (Cambridge, MA: Harvard University Press, 2006).

[89] P. Riley, 'Social Contract Theory and its Critics' in M. Goldie and R. Wokler (eds.), *The Cambridge History of Eighteenth-Century Political Thought* (Cambridge: Cambridge University Press, 2006), pp. 347–375.

community. Although this latter theory remained just one position among several, treaties became the dominant instrument for the constitution of international organisations and institutions in the twentieth and twenty-first centuries.[90]

Consensualism has, however, far deeper roots in the Western constitutional tradition than early-modern social contract theory. Indeed, the early-modern writers themselves could draw on ideas and practices which went back to the Middle Ages. Four major instances of the use of contract as a basis for political organisation can be quoted from the European Middle Ages. Firstly, the Germanic conception of kingship was based on the consent between the king and his people. Secondly, under the feudal system, power relations were based on personal contracts between lords and vassals. This convolution of private legal relationships and public authority enhanced the role of consent between rulers and subjects.[91] Thirdly, many political entities of the Late Middle Ages, such as towns, were legally construed as communities of citizens who had taken an oath to uphold the peace and law of the community.[92] Fourthly, constitutional charters need to be mentioned. These were sworn compacts whereby the princes and the representatives of the people or the estates agreed an arrangement of their mutual constitutional rights and duties. The English Magna Carta of 1215 only serves as an example for this wide-spread practice.[93] In view of the civilian doctrine of *princeps legibus solutus* – which states the primacy of sovereign power over the law – contract was the indicated instrument of binding the prince to constitutional arrangements. Both civilian and canon law – conciliarism – developed a rich tradition of constitutional contract theory.[94]

In practice, the use of treaties as constitutional acts goes back to Antiquity. A conceptual distinction can be made between international

[90] Wehberg, *supra* n. 53, at pp. 778–784.

[91] F. L. Ganshof, *Feudalism* (London: Longman, 3rd ed., 1964); S. Reynolds, *Kingdoms and Communities in Western Europe* (Oxford: Oxford University Press, 1984) and S. Reynolds, *Fiefs and Vassals: The Medieval Experience Reinterpreted* (Oxford: Oxford University Press, 1994).

[92] R. Celli, *Pour l'histoire des origins du pouvoir populaire: l'expérience des villes italiennes (XIe–XIIe siècles)* (Louvain-la-Neuve: Université Catholique de Louvain, 1980) and L. Martines, *Power and Imagination: City-States in Renaissance Italy* (New York: Alfred A. Knopf, 1979).

[93] J. C. Holt, *Magna Carta* (Cambridge: Cambridge University Press, 2nd ed., 1992).

[94] B. Tierney, *Foundations of the Conciliar Theory* (Cambridge: Cambridge University Press, 1955) and B. Tierney, *Religion, Law and the Growth of Constitutional Thought, 1150–1650* (Cambridge: Cambridge University Press, 1982).

and national constitutional treaties. The former serves to constitute or reform an international organisation whereby the treaty partners retain their position as subjects of international law. The second constitute or reform a polity – a federation, confederation of empire – which absorbs or has absorbed the international legal personality of the treaty partners. For most periods of history, the distinction has an element of anachronism in it as it derives from the modern notion of Statehood. But allowing for a large grey zone in which polities surrender some of the international competences which normally pertain to independent polities and retain others, it is functional.

One of the earliest forms of international organisation were the Greek multilateral leagues and amphictyonies. The former could either be an alliance between equal partners or be of a hegemonic nature, such as the Attic-Delian League of the fifth century BC. In the latter case, a set of bilateral treaties between the hegemonic power and the different tributary powers would form the legal framework to the league.[95] Before its further integration in the second and third centuries AD, the Roman Empire was legally speaking a complex alliance system of bilateral relations between Rome and its allies. Many of these were bound to Rome by a treaty of alliance (*foedus*), which may have been preceded by a *deditio*, but many were not.[96] From the European Middle Ages, leagues of cities and other polities, such as the Lombard League from the twelfth century or the Hanseatic League can be quoted.[97] In modern times, multilateral treaties have been the standard form for the constitution of international organisations.

Throughout history, there are different cases of multilateral alliances which with time led to federations or empires. The Roman Empire is undoubtedly the most significant example of this. For later times the Swiss Confederation and the Dutch Republic of the United Provinces, which was based on the Union of Utrecht of 29 January 1579, can be quoted.[98] From Early-Modern Europe, some peace treaties had constitutional significance. The most important examples thereof are undoubtedly the two Peace Treaties of Westphalia (Munster and Osnabruck) of 24 October 1648 which were at the same time bilateral peace treaties

[95] Bederman, *supra* n. 21, at pp. 165–171, and Phillipson, *supra* n. 21, at pp. 1–33.
[96] Gruen, *supra* n. 4, at pp. 54–95.
[97] H. Spruyt, *The Sovereign State and Its Competitors* (Princeton, NJ: Princeton University Press, 1994).
[98] J. K. Oudendijk, *Het contract in de wordingsgeschiedenis van de Republiek der Verenigde Nederlanden* (Leiden: A.W. Sijthoff, 1961).

between the Holy Roman Empire, on the one hand, and, on the other, France and Sweden respectively, as well as an 'imperial peace' and as such part of the constitution of the Empire.[99] In more modern times, the constitutional process in federal States sometimes took on characteristics of the process of the conclusion of treaties, as in the case of the Constitution of the United States.[100] The role of treaties in the constitution and devolution of colonial empires has already been remarked upon.

3.7 Treaties on Rights of Private Citizens (Including Matters of Trade, Transport and Navigations)

Among the very earliest treaties are compacts which provide for the protection under the law for foreign traders and their property. In Northern Syria, a treaty from around 2400–2250 BC has been found whereby the king of Ebla extends his jurisdiction and legal protection to the traders from his treaty partner.[101] The Greeks and Romans made use of public treaties of guestfriendship (συμβολα, hospitium).[102] Ancient treaties also include clauses regulating different aspects of trade, such as taxation or currency issues. Commercial treaties have been made in all periods of history and are known from almost all civilisations. The relationship can be equal or of a tributary nature. In general, these treaties provide legal protection for foreign traders and their property. Commercial treaty relations became particularly elaborate in early-modern Europe. Many peace treaties from that period and region contained detailed stipulations in relation to trade, navigation and the legal protection of subjects. By the late seventeenth century, it became customary to refer these clauses to separate FCN treaties. Many peace settlements included stipulations to regulate the protection of foreign property in case of new war.[103] By the nineteenth century, industrialisation, technological evolutions and the ensuing globalisation of the economy and of travel had started to expand the variety of transnational contacts between persons which were covered in treaties. Numerous

[99] Par. 112 IPM = Art. 17.3 IPO; A. Oschmann (ed.), *Die Friedensverträge zwischen Frankreich und Schweden 1 Urkunden* (Munster: Aschendorff, 1998).

[100] For a radical interpretation of the US Constitution as a treaty regime, see F. F. Martin, *The Constitution as Treaty: The International Legal Constructionalist Approach to the U.S. Constitution* (Cambridge: Cambridge University Press, 2007).

[101] Altman, *supra* n. 1, at pp. 36–37.

[102] K.-H. Ziegler, 'Regeln für den Handelsverkehr in Staatsverträgen des Altertums', *Legal History Rev*., 70 (2002), 55–67.

[103] Neff, *supra* n. 45.

treaties were and are made on international communication, transport, financial transactions, taxation, travel and many other occurrences of international life. In some cases, one can see a process whereby in a first phase networks of bilateral treaties are made until multilateralism takes over, as the GATT agreements and the World Trade Organization have done for general aspects of trade. One can only surmise whether this will also happen for investment treaties, of which a massive number has been made at the bilateral level since the 1990s.[104]

3.8 Treaties on General Issues of International Law and Common Concerns of the International Community

Multilateral treaties dealing with general aspects of international law or common concerns of the international community are a recent phenomenon. The regulations with relation to the navigation of rivers, diplomatic practice and the slave trade from the Congress of Vienna are often quoted as the first instances of it. Over the nineteenth and particularly the twentieth century, multilateral conventions have gradually grown into one of the major law-making instruments of the globalised international community. Large parts of the traditional law of international relations have been codified so that now a great variety of major issues, from the *jus ad bellum* over the laws of war and the law of the sea to diplomatic law, the law of treaties and State responsibility are covered in multilateral conventions or authoritative draft conventions. Since World War I, treaties have become a much-used instrument to deal with common concerns of international life, ranging from minority protection and labour rights in the Interbellum over human rights and the use of space, the seabed and the polar regions to environmental protection today.

4 Conclusion

All through history, the primary function of treaties has been to constitute concrete obligations between polities. But treaties have also played

[104] F. Baetens, 'Preferential Trade and Investment Agreements and the Trade/Investment Divide: Is the Whole More Than the Sum of Its Parts?' in R. Hoffmann, S. W. Schill and C. J. Tams (eds.), *Preferential Trade and Investment Agreements: From Recalibration to Reintegration* (Baden: Nomos, 2013), pp. 91–128; K. Miles, *The Origins of International Investment Law: Empire, Environment and the Safeguarding of International Capital* (Cambridge: Cambridge University Press, 2013) and K. J. Vandenvelde, 'A Brief History of International Investment Agreements', *UC Davis JILP*, 12 (2005), 157–194.

an important role in the articulation and creation of international law, as they continue to do. Five different roles treaties play as informative or constitutive sources of international law can be distinguished.

Firstly, treaties are informative sources of international law. Since they apply rules of international law to create concrete obligations among parties, they render evidence of international law. To the historian of international law, they are an important source of knowledge about the concepts and doctrines of international law of a certain time or place. This includes treaty law as well as substantive areas of international law such as *jus in bello, jus post bellum*, trade and navigation.[105] Secondly, because treaty makers often use older treaties for inspiration, different traditions – referred to as lore or *mores* – of treaty practices have been formed throughout history. This does not extend to formal law creation as long as the treaty parties accept no legal obligation to sustain an existing practice. But, thirdly, in some cases, particular treaty traditions may become binding as they are accepted as an expression of customary law and *opinio juris* is attached to them. So the custom of extending amnesty for wartime actions in peace treaties was for a long time just a part of the *mores* of peace treaties, until amnesty came to be considered implied in peace treaties and was made part of the customary law of peace-making. Fourthly, treaties are used to codify customary international law. This only came to the fore during the nineteenth century with the emergence of multilateral conventions. Fifthly, treaties can create new rules of international law by agreement between the parties. In this role, treaties act as formal sources of international law. This is the category of so-called *traités-lois*. Whereas this form of law creation by treaties occurred in earlier times at the bilateral level – one can consider treaties of guest friendship, trade and navigation as such – it became particularly important through the use of multilateral conventions.[106]

[105] See the note on terminology at *supra* n. 11.

[106] For the role of law-making treaties in different fields of international law, see the chapters comprising Part II of this volume.